

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
GMO GAMECENTER USA, INC., et al., : Docket #1:22-cv-05974-
 : JPC-KHP
 :
 Plaintiffs, :
 :
 - against - :
 WHINSTONE US, INC., : New York, New York
 : October 25, 2022
 Defendant. :
 : INITIAL CASE
 ----- : MANAGEMENT CONFERENCE

PROCEEDINGS BEFORE
THE HONORABLE KATHARINE H. PARKER,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For Plaintiffs: HAYNES AND BOONE LLP
BY: LESLIE C. THORNE, ESQ.
(appearing telephonically)
30 Rockefeller Plaza, 26th Floor
New York, New York 10112

For Defendant: FOLEY & LARDNER, LLP
BY: ROBERT ALLEN SCHER, ESQ.
BENJAMIN I. BASSOFF, ESQ.
90 Park Avenue
New York, NY 10016

Transcription Service: Carole Ludwig, *Transcription Services*
155 East Fourth Street #3C
New York, New York 10009
Phone: (212) 420-0771
Email: Transcription420@aol.com

Proceedings conducted in person and telephonically and
recorded by electronic sound recording;
Transcript produced by transcription service

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<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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None

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2 THE CLERK: Calling case 22-cv-5974, GMO
3 Gamecenter USA vs. Whinstone US Corp.

4 Beginning with counsel appearing by telephone,
5 please make your appearance for the record.

6 MS. LESLIE C. THORNE: Leslie Thorne at Haynes
7 Boone for GMO.

8 HONORABLE KATHARINE H. PARKER (THE COURT):
9 Good morning. Ms. Thorne, can you hear me clearly?

10 MS. THORNE: Yes, I can. Can you hear me?

11 THE COURT: Yes. So if there's something -- if
12 you haven't heard something, I ask that you speak up,
13 okay?

14 MS. THORNE: Okay.

15 THE CLERK: And counsel for the defendants,
16 please make your appearance for the record.

17 MR. ROBERT SCHER: On behalf of defendants,
18 Robert Scher and Benjamin Bassoff from Foley & Lardner,
19 LLP.

20 THE COURT: All right. Nice to see you.

21 So we're here for an Initial Case Management
22 Conference. And I guess this is an essentially breach-
23 of-contract issue. Ms. Thorne, why don't you tell me a
24 little bit about the issues in the case and go into a
25 little bit more detail about the discovery that you are

1
2 intending.

3 MS. THORNE: Sure. I'd be happy to. As you
4 mentioned, this is a breach-of-contract action. It
5 stems from what's called a co-location agreement. And
6 under that agreement, my client agreed to essentially,
7 sort of for purposes of simplification, lease space and
8 engage other services from Whinstone, which provides
9 what's called a data center to mine bitcoin. There's a
10 long history here, but essentially GMO has encountered
11 repeated significant difficulties. And those include
12 Whinstone failing to provide the necessary contracted-
13 for power to supply the machines. It's a very power-
14 intensive process. Whinstone has removed GMO's machines
15 from service, has failed to share the profits of power
16 sales to others, which is addressed in the contract
17 between the parties, and has charged excess amounts. So
18 there are a number of different issues here.

19 We would ask for a good bit of discovery on
20 those items. As I'm sure you've seen, there are also
21 counterclaims filed against our client. So, you know,
22 we would anticipate doing discovery on those. That
23 includes issues related to negotiation of both the
24 agreement at issue and a predecessor agreement that is
25 contemplated in the agreement at issue but that sort of

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plays into that. I anticipate there will also be a good bit of discovery related to the damages piece on both sides. Both sides have claimed significant damages. We've claimed almost over \$100 million in damages. Much of that has to do with lost profit, so I imagine that will be a fairly arduous process going through the discovery issues related to that. And many of the claims against my client also involve Whinstone's allegations of lost profits that we don't have a full understanding of yet, but I anticipate there will be significant discovery on that.

I would just note one other thing that may complicate things a good bit and may play into the schedule, and that is that our clients are all based in Japan. And many of them are not native English speakers, and so I anticipate there will be some translation issues, both when it comes to depositions and when it comes to documents.

THE COURT: Okay. Are you anticipating that you'll do remote depositions, or are you going to bring your clients here to New York?

MS. THORNE: I think that, to the extent possible, we would want to do it remotely. And I'll let Bob speak for himself, but I think we sort of, at least

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preliminarily thought that that would likely be the case. But, you know, I also understand that Whinstone does not want to, you know, waive the ability to ask for my clients to come to New York.

THE COURT: Okay. And so as I understand it, you don't anticipate any discovery disputes at this time. You've laid out with good particularity the subjects on which you seek discovery.

I'll hear from defendant about your counterclaims and defenses now.

MR. SCHER: Thank you, your Honor. And I don't necessarily disagree that this will be a fair amount of discovery, although I think some of -- I wouldn't call it a dispute at this time -- I think some of the topics listed may not really be appropriate. So, for example, Ms. Thorne, both in the position statement and in some of the things she said today, talks about the prior agreement, the breaches of the prior agreement and things that Whinstone did or didn't do, but that agreement was superseded by a new agreement. The new agreement talked about the various breaches under the previous agreement and how they were going to be dealt with. And they were dealt with. So certain amounts were owed by the defendant to the plaintiffs. And all

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but one of those were paid. And the one bucket that wasn't paid, which is one of the major issues in this case, has been the source of a lot of back-and-forth of Whinstone saying, "What do we owe you? And why do we owe it to you? Give us the backup." And, you know, at one point they said it was \$3 million; now they're talking in the 30-millions of dollars. But never, up until still as we sit there today, have we gotten any indication of what that amount is.

Now, I will say we had a meet-and-confer yesterday because we got their initial disclosures. And, again, we got a number; we didn't get a calculation. And Ms. Thorne did agree to supplement that and said next week we would get sort of a full Excel spreadsheet breakout of that. So, you know, we look forward to seeing that.

But part of the agreement, and not including this bucket that remains unpaid, and it's not supposed to be paid in cash, as they're seeking now; it gets paid by a reduction in the fee. But once we completed the other things, they were getting very preferential treatment under the new agreement to enable these things to be taken care of. And under the new agreement, the agreement at issue, once those things were taken care

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of, they were obligated, the parties were obligated to negotiate a new agreement on more typical terms that we provide to our other customers. And we've just been stonewalled every step of the way. They have refused to engage in those negotiations.

THE COURT: So there was an agreement to agree in the new agreement?

MR. SCHER: Yes, there is.

THE COURT: In the operative contract?

MR. SCHER: Yes. And nobody denies that the things that trigger that step have occurred.

THE COURT: Except for the one --

MR. SCHER: No, the --

THE COURT: -- where there's a dispute?

MR. SCHER: There is a dispute on the one, but that's not included in the trigger.

THE COURT: I see. I see. And the one area of dispute -- tell me if I'm correct in my understanding -- that pertains to the power or the removal of the machines?

MR. SCHER: No, no, that has to do with the power shortage.

THE COURT: The power shortage. Okay.

MR. SCHER: And then in terms of operations,

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2 you know, look, there are disputes back and forth. They
3 say we didn't have sufficient power to supply them.
4 They put in -- I don't remember the number -- like
5 nowhere near what they were supposed to use, the space.
6 So not only, you know --

7 THE COURT: You mean, they didn't have enough
8 machines in the space?

9 MR. SCHER: They didn't have the ability to use
10 even the power that we were providing them; and at the
11 same time, by not providing the power to them, we were
12 prevented from providing the power to other customers
13 who would actually use the space, so --

14 THE COURT: I see, so you -- it's your position
15 that they were requiring you to reserve power that they
16 weren't using and not to reallocate it?

17 MR. SCHER: Exactly.

18 THE COURT: Okay.

19 MR. SCHER: And with respect to machines being
20 removed, they were broken, they were inoperable. So,
21 you know, those are the --

22 THE COURT: The machines are pretty expensive,
23 right?

24 MR. SCHER: Everything's expensive, yes, yes.

25 THE COURT: Right. I've had a couple --

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2 MR. SCHER: So I'm not saying --

3 THE COURT: -- involving these crypto machines,
4 mining machines.

5 MR. SCHER: Yeah, I'm not saying that we have a
6 discovery dispute, but when I look at the list of the
7 areas -- so, you know, we'll do our document requests,
8 and they'll do theirs, and we'll object to certain
9 things that we don't think are, you know, relevant or
10 necessary, and we'll see -- we've worked very well
11 together so far. We're at the very early stages. So I
12 anticipate any disputes, we'll discuss; and, obviously,
13 we'll bring anything that we can't resolve to you.

14 THE COURT: And how much of the discovery will
15 be e-discovery, you know, emails and things like that?

16 MR. SCHER: All of it.

17 THE COURT: All of it?

18 MR. SCHER: Practically all of it. I mean, in
19 this day and age --

20 THE COURT: All of it.

21 MS. THORNE: Yes, I think a good bit of it.

22 THE COURT: Have you already discussed who the
23 relevant custodians are?

24 MR. SCHER: We have not. We've listed people
25 in the initial disclosures, but we have not -- we've

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agreed to the general process, that we will propose custodians, we'll propose search terms. And, you know, everybody's sent out litigation hold notices and documents are being preserved. But we haven't gone through that process yet.

THE COURT: Okay. For the ESI protocol, I just throw out something for you all to consider, which is whether it makes sense for the parties to do an initial production based on their own best assessments of how to collect the responsive documents, what's a reasonable search; and then if there's -- you can disclose the search terms that you use, if that's what you're using, and then if through review of documents that are produced and depositions, there needs to be a supplemental review and production, that might be more efficient, maybe. I just find that sometimes if it's a heavy e-discovery case, that if there are a lot of disputes over search terms, it can delay things quite a bit, and it may not be particularly meaningful in the end. And so I just ask both sides to think about what will be efficient, and maybe the ESI discovery can be more iterative and maybe that would be more efficient. But I just throw that out there for you to think about.

MR. SCHER: Thank you, your Honor. We're happy

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to discuss that with Ms. Thorne.

And the one thing I will say that we already have agreed to is -- although we haven't identified the documents -- that certain documents, you know, that are the key documents in the case, the agreements and, you know, things like that, we will produce irrespective of search terms and things like that.

THE COURT: Right, right, of course. Of course. I mean, what you're going to -- so it sounds like it's not really the negotiation of the contract but it's the fulfillment of the contract. And there may be certain individuals who have knowledge of this power or communications relating to the provision of power, requests for the power, reallocation of the power; it sounds like that's where the focus of e-discovery will be. Is that right?

MR. SCHER: I would agree -- I would agree with that.

THE COURT: Ms. Thorne, do you agree with that?

MS. THORNE: I think that's fair, yes. I do.

THE COURT: Okay. I have some samples on my -- for e-discovery on my web page -- so you're welcome to take a look at that -- or topics to discuss. And do you anticipate there being significant privilege issues in

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the case?

MR. SCHER: I anti --

MS. THORNE: I do not.

MR. SCHER: Yeah, I mean, there may be some
privilege issues, but I don't think it's significant.

THE COURT: Okay.

MR. SCHER: And I know on our end --

MS. THORNE: Nothing out of the ordinary.

MR. SCHER: -- lawyers were involved along the
way, but I don't think it will be a problem.

THE COURT: Okay. So if there's not going to
be an extensive privilege log, then I'll leave it to you
all to discuss. But if it's going to be more extensive,
then you can think about bucketing and things of that
sort. So I'd ask you to think about that and what makes
sense to be efficient.

And it sounds like with respect to the damages,
that much of that may be through expert testimony.
Ms. Thorne, is that correct?

MS. THORNE: I agree with that. I think
there'll be a good bit of expert testimony in this case.

THE COURT: Okay. And then I see there's no
jury demand, so this would be a bench trial on the
contract; is that right?

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MS. THORNE: Correct.

MR. SCHER: Yes, your Honor.

THE COURT: All right. If there are -- you may already have remote deposition protocols that you use and that you like. If you want to look at what I have on my website, you're welcome to use it. I do have a form, confidentiality agreement, so if there's confidential information that's being exchanged. My form has worked. It's really, really simple, doesn't have a lot of legal muck. Obviously, if you want to negotiate something more specific about clawbacks and that kind of thing, you can add it; but I ask that you send me a redline of the -- of changes to it. And this is just to cut down on time negotiating on provisions that have a lot of legalese and not a lot of meaning or -- okay.

Now, for any discovery disputes that may arise, I do like to try to resolve those informally, if I can. I do expect the parties to meet and confer, and if you cannot resolve the issue, to send me a letter and I'll try to schedule a conference in short order to see if I can resolve it, rather than through formal briefing. If there needs to be formal briefing on a discovery issue, of course we can set a schedule. But hopefully, we can

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avoid that in this case.

I'm going to set -- I'm going to adopt your proposed schedule; and what I'm going to do is set another date for a Case Management Conference in December.

Chris, what date do we have open, before the 15th?

THE CLERK: How about the 5th at 11:30 or --

THE COURT: That's fine.

THE CLERK: Yes, 11:30? Is that good?

THE COURT: Yes.

THE CLERK: In person?

THE COURT: Yes.

Now, I assume it's premature to talk about settlement right now, since the parties have been having discussions or since it seems like there needs to be some fleshing out of the damages theories. But I'm happy to schedule a settlement conference if the parties would like.

MR. SCHER: Well, your Honor, Ms. Thorne and I have talked about mediation. And it seems -- you know, both parties, they have an existing relationship, which is always helpful.

THE COURT: Yes.

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MR. SCHER: Or can be helpful. Ms. Thorne suggested the two of us talk a little bit first because, in her view -- and I don't disagree with this view -- the clients are talking over each other. And we haven't talked about specifics, but I think the idea is, whether it's with you or some outside service, to possibly do an early mediation. I don't know -- you know, I think I know the answer to his question. My client wants to know, well, do things get put on hold if we do that so we're not spending money in two areas, so this may be premature. But I don't know if your view is if you want to mediate, go ahead and mediate, but the schedule is the schedule, and --

THE COURT: So it depends on the case. It depends how close you are and how likely settlement is to be reached. And so I need to know, you know, more details about it. If I'm supervising a settlement conference and I have a good sense of what's happening, you know, then that's sometimes helpful to me, to understand where the parties are. If you want an early settlement conference, I can fit you in in January, but not before January.

MR. SCHER: Okay. So why don't Ms. Thorne and I -- we've already agreed to talk further on this -- but

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2 it sounds like we should do that. And even if it's
3 before our December 5th conference, if we can get in
4 touch with you and let you know --

5 THE COURT: Sure.

6 MR. SCHER: -- where we are and if we need your
7 services.

8 THE COURT: Sure. And for settlement
9 conferences, I am doing them in person. If you think
10 that this -- if it's a more complex situation, sometimes
11 I've had just the lawyers come in and for a -- if
12 there's going to be some business dealing going forward,
13 in other words, sometimes the lawyers want to discuss
14 the structure for a settlement and then the parties come
15 in a second day to have a more robust discussion to
16 finalize things. So it depends on the case. But that's
17 also something that, you know, you can talk about if you
18 think that's -- it's really a two-part kind of
19 discussion. I've done that sometimes in complex cases
20 where there may be a business deal as part of the
21 settlement. So you can let me know in December, at the
22 December conference, if you want to put something on the
23 calendar. Okay?

24 MR. SCHER: Thank you.

25 THE COURT: Anything else, Ms. Thorne?

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2 MS. THORNE: Your Honor --

3 THE COURT: Yes.

4 MS. THORNE: -- the only thing I couldn't hear
5 was what the date is for the December Settlement
6 Conference.

7 THE COURT: December 5. And that will be in a
8 Scheduling Order that I'll issue after this conference.
9 December 5 at 11:30.

10 MS. THORNE: I have a mediation on the 5th and
11 6th. Is there any way that we could schedule for
12 another date?

13 THE COURT: Yes.

14 MS. THORNE: Apologies.

15 THE CLERK: Judge, how about the 13th?

16 THE COURT: At four?

17 THE CLERK: I was going to say like 11:45.

18 THE COURT: No. We could do the 13th at four.

19 MS. THORNE: That works for me. I very much
20 appreciate it.

21 THE COURT: That's a Tuesday.

22 MS. THORNE: Yes.

23 MR. SCHER: I don't have my phone on me, but I
24 assume that's fine.

25 THE COURT: Okay. December 13 at four.

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MS. THORNE: Thank you very, very much.

MR. SCHER: Thank you, your Honor.

THE COURT: Okay. Nice to meet everybody. See
you in December.

(Whereupon, the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Gamecenter USA, Inc. et al v. Whinstone US, Inc., Docket #22-cv-05974-JPC-KHP GMO, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: October 26, 2022